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No. 10-384

Supreme Court, U.S.
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In the Supreme Court of the United States

SHOLAM WEISS, PETITIONER

v.

STAN YATES, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had authority under 28 U.S.C. 2241 to vacate a judgment of conviction and resentence petitioner in order to comply with the condition on which petitioner was extradited after he fled to Austria during his trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 375 Fed. Appx. 915. The opinion of the district court (Pet. App. 14-45) is unreported, but is available at 2008 WL 5235162.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2010. A petition for rehearing was denied on July 12, 2010 (Pet. App. 73-74). The petition for a writ of certiorari was filed on September 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was

convicted on multiple charges of racketeering, wire fraud, interstate transportation of stolen funds, money laundering, the making of false statements, and obstruction of justice. Pet. App. 55-56. Petitioner fled during jury deliberations, and he was sentenced in absentia to 845 years of imprisonment. His direct appeal was dismissed because he remained a fugitive. Petitioner was later apprehended in Austria and extradited to the United States. Petitioner filed this habeas petition under 28 U.S.C. 2241, seeking release from custody on the ground that the United States had breached the terms of his extradition. The district court held that Austria had denied extradition with respect to petitioner's conviction for obstruction of justice (Count 93), for which petitioner had received a sentence of ten years of imprisonment; the court therefore granted the petition in part, vacated the judgment of conviction, reentered the judgment as to the counts other than Count 93, and reduced the sentence to 835 years. Pet. App. 14-46. The court of appeals affirmed. *Id.* at 1-5.

1. In 1998, petitioner was indicted along with several others for offenses relating to a decade-long scheme to defraud the National Heritage Life Insurance Company (NHLIC) of millions of dollars and to use the stolen funds to commit further frauds. The scheme also involved laundering money stolen from NHLIC through a series of property purchases and resales. See *United States* v. *Weiss*, 467 F.3d 1300, 1303 (11th Cir. 2006), cert. denied, 552 U.S. 891 (2007). Petitioner was charged, in a total of 78 counts, with racketeering and racketeering conspiracy, see 18 U.S.C. 1962(c) and (d); wire fraud, see 18 U.S.C. 2, 1343, and 1346; interstate transportation of stolen property, see 18 U.S.C. 2 and 2314; money laundering, see 18 U.S.C. 1956 and 1957;

making false statements, see 18 U.S.C. 2 and 1001; and in Count 93, obstruction of justice, see 18 U.S.C. 1503. Petitioner attended his jury trial, which lasted eight months, until the jury retired to deliberate. At that point, he fled and failed to appear thereafter. Pet. App. 2, 18-19; see Fed. R. Crim. P. 43(c) (defendant's voluntary absence after trial has begun waives his right to be present).

Petitioner was convicted of all charges and was sentenced to a total of 845 years of imprisonment, to be followed by three years of supervised release. Pet. App. 19, 59. He was also fined $123,399,910 and ordered to pay $125,016,656 in restitution. *Id.* at 19, 57-59, 62. The total term of imprisonment included a ten-year term on Count 93, the obstruction of justice count. *Id.* at 19. Petitioner's counsel filed a timely notice of appeal, but the court of appeals dismissed the appeal on the basis of the fugitive disentitlement doctrine. *Id.* at 19-20; see *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-240 (1993); *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam).

2. In October 2000, nearly a year after his flight, petitioner, a citizen of the United States, was found in Austria and placed under provisional arrest at the request of United States authorities. On December 18, 2000, the United States made a formal extradition request pursuant to the extradition treaty between the Republic of Austria and the United States. Pet. App. 20; see Extradition Treaty with Austria, U.S.-Austria, Jan. 8, 1998, S. Treaty Doc. No. 105-50 (1998), T.I.A.S. No. 12916 (Treaty).

In connection with the extradition proceedings, an Austrian lower court sought assurances that petitioner would be afforded an appeal if extradited to the United

States. In 2001, in an effort to provide the requested assurances, the United States sought to reinstate petitioner's appeal and also requested that the district court vacate petitioner's judgment. Both courts denied the motions. The Austrian lower court consequently denied extradition, but that decision was reversed by the Austrian Supreme Court. On remand, the lower court ruled that petitioner could be extradited on all counts of conviction, except Count 93. Gov't C.A. Br. 10-13; Pet. App. 20-21 (describing Austrian judicial proceedings).

In June 2002, Austrian authorities extradited petitioner to the United States with respect to all the offenses of which he had been convicted, with the exception of Count 93. App., *infra*, 1a (official diplomatic note informing the United States of the decision to extradite petitioner "to serve the sentence imposed by [the district court's] verdict," excluding the "portion of the sentence due to Count 93"). Austrian authorities denied extradition on Count 93 because no crime under Austrian law corresponds to obstruction of justice, and therefore the Treaty's requirement of dual criminality was not satisfied. Pet. App. 15-16, 20-21.

Under the rule of specialty, which is incorporated into the Treaty, see Pet. App. 86-87, a requesting state may not punish an extradited person for an offense on which extradition has been denied, see *id.* at 15 n.4. In an effort to comply with the rule of specialty and avoid punishing petitioner on Count 93, the government moved for resentencing. The district court denied the motion on the ground that it lacked authority, in the context of petitioner's criminal case and in the absence of a postconviction motion (such as a Section 2255 motion), to resentence petitioner. *Id.* at 46-54 (explaining

that the circumstances in which Rule 35 permitted resentencing were not present); Gov't C.A. Br. 17.

3. In July 2002, petitioner filed a habeas petition under 28 U.S.C. 2241, alleging that the United States had deliberately misrepresented American law to Austrian authorities in derogation of its obligations under the Treaty, that the resulting extradition was in violation of the Treaty, that United States courts consequently lacked jurisdiction to enforce his sentence, and that he should be released from custody. Pet. App. 21. The district court initially denied the petition, *id.* at 22, but it then granted reconsideration and allowed discovery and further briefing. *Id.* at 23-24.

During the discovery proceedings in the district court, the United States, with the court's approval, sent a formal diplomatic inquiry to Austria concerning any assurances on which the Austrian government had relied in granting extradition. Pet. App. 26. The Austrian government responded that it had denied extradition on Count 93 and that it had acted in reliance on the rule of specialty, which is incorporated in the Treaty. *Id.* at 92-93. As a result, the diplomatic note stated, Austria expected that petitioner would be resentenced "to correspond to the partial rejection (i.e. concerning count 93) of the extradition." *Id.* at 93. The Austrian government also stated that it understood that petitioner's resentencing would "lead to a right of appeal," *id.* at 92-93; and that in Austria's opinion, the United States had not disregarded any assurances, assuming that the present proceedings ultimately resulted in compliance with the rule of specialty. *Id.* at 93; *id.* at 27-28.

The district court granted petitioner's Section 2241 petition in part and denied it in part. Pet. App. 6-13. The district court first determined, relying on Eleventh

Circuit precedent, that petitioner had standing to assert that his custody violated the Treaty insofar as he alleged a violation of the rule of specialty, subject to Austria's right to waive any such violation if it so chose. *Id.* at 29 (citing *United States* v. *Puentes*, 50 F.3d 1567, cert. denied, 516 U.S. 933 (1995)). The court also noted that 28 U.S.C. 2241, which authorizes challenges by prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States," expressly provides an avenue for collaterally attacking a conviction and sentence on the basis of a treaty violation. 28 U.S.C. 2241(c)(3).

Turning to the Austrian government's diplomatic note, the court concluded that—as the United States had consistently acknowledged—the Austrian authorities had denied extradition on Count 93 and that the Austrian government's concern was that the United States comply with the rule of specialty, which required that petitioner not be punished on Count 93. Pet. App. 32-37. Austria also understood, the court noted, that petitioner would have an opportunity to appeal the judgment after he was resentenced to remove Count 93. *Id.* at 37. The court therefore rejected petitioner's argument that any statements made by the United States about "the procedural device that would result in obedience to the rule of specialty" constituted conditions on petitioner's extradition or were material to the United States' compliance with the rule of specialty. *Id.* at 36; see *id.* at 33-37.

The district court then rejected petitioner's argument that the court had no authority to grant any relief short of complete release. Pet. App. 37-41. The court held that a court adjudicating a Section 2241 petition "has a full arsenal of remedies to correct unlawful detentions short of ordering outright release where a lesser

directive will suffice to right the wrong," *id.* at 39, and that it would be erroneous to grant more relief than necessary to comply with the rule of specialty and avoid violating the Treaty. *Id.* at 40-41 (citing *United States* v. *Morrison*, 449 U.S. 361, 364 (1981)).

The district court accordingly held that petitioner should be permitted to amend his petition to request that the court vacate the judgment of conviction and reenter judgment on the counts other than Count 93, thereby enforcing the rule of specialty. Pet. App. 43-44. The reentry of judgment would also restart the time for appeal, thereby permitting petitioner to appeal his convictions and sentence. This remedy, the court noted, had previously been approved by the Eleventh Circuit in other situations in which the court found that a defendant should have the opportunity to pursue an appeal that had previously been foreclosed, and "[g]iven the procedural and substantive posture of this case, it seems most appropriate to utilize this technique here as well." *Id.* at 44.

Petitioner subsequently amended his petition to include a request for the relief outlined by the district court, while also renewing his argument that the court lacked authority to vacate and reenter the judgment in a proceeding under Section 2241. The court rejected that argument, explaining that it had already concluded that complete release was an inappropriate remedy, "and if a lesser alternative is unavailable, the inexorable result would be dismissal" of the petition. Pet. App. 10. The court therefore entered an order implementing the disposition it had earlier described. *Id.* at 11-13; 55-72.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-5. The court found "no clear error" in the district court's interpretation of the

diplomatic communications at issue. *Id.* at 4. The court therefore concluded that the remedy ordered by the district court—the elimination of the sentence for Count 93, the reentry of petitioner's sentence without that count of conviction, and the resulting opportunity for a full appeal of his conviction and sentence—was appropriate. The court rejected petitioner's argument that the district court had no authority to order any remedy short of complete release and that only Section 2255 authorized correcting petitioner's sentence, explaining that "[w]hether construed under § 2255 or § 2241, the district court had jurisdiction to issue the relief it did given the unique facts of this case." *Id.* at 4 n.3.

The court of appeals therefore affirmed the district court's conclusion that petitioner could proceed to appeal his reentered conviction and recalculated sentence. The government, the court observed, had stated that it "does not and will not oppose granting [petitioner] a full appeal of his conviction and the recalculated sentence without Count 93." Pet. App. 4. The court held that petitioner's direct appeal, which had been docketed and stayed pending the resolution of the instant case, could now proceed. *Id.* at 5.

ARGUMENT

Petitioner renews his contention (Pet. 14-34) that the district court lacked authority to vacate and reenter his convictions and resentence him, and that the only remedy available to the courts was to release him altogether and allow him to return to Austria. Petitioner's arguments are without merit. The district court appropriately exercised its broad discretion to dispose of a habeas petition under Section 2241 "as law and justice require." 28 U.S.C. 2243 para. 8. It crafted a remedy that

is closely tailored to, and ensures compliance with, the only condition on which petitioner was extradited—namely, that the United States honor the rule of specialty by ensuring that petitioner not be convicted or sentenced on Count 93. The court of appeals' decision affirming the district court's remedial order does not conflict with the decisions of this Court or any other court of appeals. Moreover, petitioner acknowledges (Pet. 1) that the circumstances of this case are "unique" and are unlikely to arise with any frequency. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 14-20) that the district court was obligated to release him entirely because it had no authority under 28 U.S.C. 2241 to vacate his conviction on Count 93 or to modify his sentence. Petitioner is incorrect.

a. Petitioner properly brought this challenge to his custody under Section 2241, which permits a defendant to assert that she is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). As petitioner points out, he does not contend that his "sentence was *imposed* in violation of" the laws of the United States, and so he did not bring a challenge to his conviction and sentence under Section 2255, the primary vehicle through which a federal prisoner may attack the imposition of his conviction and sentence. Pet. 15. Rather, petitioner contends that his continued custody violates the condition on which he was extradited. Petitioner's challenge to his custody therefore falls within the ambit of Section 2241(c)(3).

b. A court's power to fashion relief under Section 2241 is not limited in the manner that petitioner contends. Section 2241 is the "primary federal habeas corpus statute," *Zadvydas* v. *Davis*, 533 U.S. 678, 687

(2001), and it authorizes any person to challenge her custody as violating federal law. 28 U.S.C. 2241(c)(3). Section 2243 accordingly confers authority on federal courts to dispose of a habeas petition under Section 2241 "as law and justice require." 28 U.S.C. 2243 para. 8. This language, the Court has confirmed, affords a court "broad discretion * * * in fashioning the judgment granting relief to a habeas petitioner." *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987); *In re Bonner*, 151 U.S. 242, 261 (1894) (predecessor of Section 2243 vests a federal court "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*").

The Court has consistently held that Section 2243 "does not limit the relief that may be granted to discharge of the applicant from physical custody." *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968) (holding that Section 2243 permits relief to a defendant who challenged his state conviction after having served his sentence); see *Peyton* v. *Rowe*, 391 U.S. 54, 66-67 (1968) (stating that habeas courts may "fashion appropriate relief other than immediate release," and canvassing cases in which relief declaring one sentence invalid would not have resulted in the petitioner's release). Courts presented with habeas petitions under Sections 2241 and 2243 (and their predecessor statutes) have accordingly granted relief in the nature of modifying or correcting a sentence. See, *e.g.*, *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1446, 1449 (3d Cir. 1991) (Section 2243 permits court to order that sentence be reduced by 39 months), cert. denied, 505 U.S. 1229 (1992); *Bryant* v. *United States*, 214 F. 51, 53 (8th Cir. 1914) (petitioner sought through "habeas corpus wholly to escape the remainder of his term of imprisonment," but the court "properly prevented

this by sending him back for a correction of the [federal] sentence," because "[i]n habeas corpus a court is expressly authorized 'to dispose of the party as law and justice require'" (citation omitted)); see also *Boumediene* v. *Bush*, 553 U.S. 723, 779-780 (2008) (release is not the exclusive remedy in habeas cases, "and is not the appropriate one in every case in which the writ is granted"); *United States* v. *Pridgeon*, 153 U.S. 48, 64 (1894) (where only a portion of petitioner's sentence was invalid, suggesting that lower court on remand could direct that only the valid portion of the sentence be carried out); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.4(4), at 1700 (5th ed. 2005) (Section 2243 permits courts to take "any other action that affects the fact, length, or conditions of existing custody and that is necessary * * * to 'dispose of the matter as law and justice require'") (quoting 28 U.S.C. 2243).[1]

Petitioner nonetheless argues (Pet. 15) that only Section 2255 grants a court the authority to vacate a conviction and modify a sentence. See 28 U.S.C. 2255(a) (Supp. III 2009) (stating that court may "vacate, set aside or correct the sentence"). That argument lacks merit. Although a federal prisoner must ordinarily use Section 2255 to challenge the imposition of his conviction and sentence, Section 2241 may be used for that purpose when Section 2255 is "inadequate or ineffective." See 28 U.S.C. 2255(e) (Supp. III 2009); *Reyes-Requena* v.

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[1] Petitioner argues (Pet. 20), without support, that under Section 2241, a court may not "vacat[e] a conviction and sentence to satisfy treaty obligations." But Section 2241 expressly permits defendants to challenge their custody on the basis of treaty obligations, and Section 2243 para. 8 on its face does not place any limits on the relief that a court may order if it concludes that a treaty has been violated.

United States, 243 F.3d 893, 901 (5th Cir. 2001) (holding that Section 2241 "may be utilized by a federal prisoner to challenge the legality of his or her conviction or sentence" if Section 2255 is inadequate). That rule presupposes that courts have the authority to vacate a conviction and modify a sentence under Sections 2241 and 2243. See, *e.g.*, *United States* v. *Triestman*, 178 F.3d 624, 629 (2d Cir. 1999) ("Courts hearing § 2241 motions have traditionally had the power to vacate or reduce such sentences [imposed in violation of federal law] when necessary to cure these kinds of defects."); see also, *e.g.*, *Simon* v. *United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) (noting previous vacatur of conviction and reduction of sentence in response to Section 2241 petition); *Alamin* v. *Gerlinski*, 73 F. Supp. 2d 607 (W.D.N.C. 1999) (granting relief under Section 2241 by vacating 18 U.S.C. 924(c) conviction and modifying sentence).

The decisions on which petitioner relies are not to the contrary. They stand for the proposition that defendants challenging the *imposition* of their convictions and sentences ordinarily must use Section 2255 to do so, lest Section 2241 be used to circumvent the procedural limitations on Section 2255. See, *e.g.*, *Antonelli* v. *Warden*, 542 F.3d 1348, 1352 n.1 (11th Cir. 2008) (stating that "federal prisoners cannot avoid the procedural restrictions on § 2255 motions by changing the caption on their petition to § 2241," and that where Section 2255 is available, a defendant "may proceed under § 2241 only [for] claims outside the scope of § 2255(a)"); *Chambers* v. *United States*, 106 F.3d 472, 474-475 (2d Cir. 1997) (defendant's Section 2255 challenge to the imposition of his sentence, following a Section 2241 challenge to the execution of his sentence, was not a second or successive

motion under 28 U.S.C. 2244); *Valona* v. *United States*, 138 F.3d 693, 694 (7th Cir. 1998) (a petitioner may not "use a petition under § 2241 to call into question the validity of a conviction or sentence that has already been subject to collateral review"); see also *Zayas* v. *INS*, 311 F.3d 247, 256-257 (3d Cir. 2002) (noting that Section 2241 "embrac[es], for example," challenges to the execution of a sentence). These decisions thus do not suggest that intrinsic limitations cabin the relief that a court may order in a properly presented Section 2241 habeas petition.[2]

2. a. Petitioner next contends that the relief ordered by the district court does not comply with the rule of specialty, because Austria "received assurances" from the United States that petitioner would be granted a full resentencing on all counts of conviction. Pet. 1-2, 28, 30-33. To the contrary, the court's decision to vacate petitioner's conviction on Count 93 and to modify his sentence to exclude any punishment for Count 93 (and thereby restart the time for an appeal) fully complied with the rule of specialty. The district court correctly rejected petitioner's assertion that a full resentencing was a condition of petitioner's extradition, and the court of appeals discerned "no clear error" in the district

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[2] Petitioner also relies on *United States* v. *Diaz-Clark*, 292 F.3d 1310, 1311, 1316-1317 (11th Cir. 2002), which held that a district court "without any federal habeas corpus petition before it" may modify a sentence only under the circumstances enumerated in 18 U.S.C. 3582(c)(1)(B) and Federal Rule of Criminal Procedure 35. But *Diaz-Clark* is inapposite here because it did not concern a district court's powers to fashion relief under 28 U.S.C. 2241 or 28 U.S.C. 2255 (Supp. III 2009). In addition, any intra-circuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

court's factual findings on this point, Pet. App. 4. Further review is not warranted.

The only condition that Austria placed on petitioner's extradition arose from its denial of extradition with respect to Count 93. See App., *infra*, 1a (Austria's diplomatic note informing the United States that petitioner would be extradited to "serve the sentence" imposed by the district court, except that "[t]he portion of the sentence due to Count 93 * * * is excluded as concerns extradition."). As a result of that denial, the rule of specialty, as incorporated in the Treaty, Pet. App. 86-87, required that petitioner not be punished for Count 93. The district court correctly held that Austria had confirmed, in a formal diplomatic note, that Count 93 was its sole concern when it ordered extradition. *Id.* at 36-37. That communication stated that, in Austria's view, the Treaty and the rule of specialty would be satisfied if the United States ensured that petitioner's sentence "will be newly assessed * * * in order to correspond to the partial rejection (i.e., concerning [C]ount 93) of the extradition." *Id.* at 93; *id.* at 92 (also noting its "understanding" that petitioner would be able to appeal the new sentence). As the district court correctly found, therefore, any statements made by the United States to Austria about the precise procedural mechanism through which the rule of specialty would be honored (whether through a full resentencing or other vehicle) were immaterial to the United States' only obligation—which was to comply with the rule of specialty by refraining from punishing petitioner on Count 93, however that result was accomplished.[3] *Id.* at 36-37. Petitioner's

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[3] In addition, as the court of appeals held, even if the United States' statements to Austria were considered conditions on extradition, the

assertion (Pet. 32-33) that a resentencing on all counts was a condition of extradition thus challenges the factual conclusions of both courts below and does not warrant review.

b. Petitioner also argues (Pet. 24-25) that "if assurances given under an extradition treaty cannot be fulfilled, the United States is required to order the extradited person's return to the place from which that person was extradited." As an initial matter, the premise of petitioner's argument is incorrect for the reasons stated above; the relief granted by the district court entirely fulfills the condition on which petitioner was extradited. In any event, petitioner's argument is without merit.

Petitioner relies on *Johnson* v. *Browne*, 205 U.S. 309 (1907), in which Canada had refused to extradite Browne, a fugitive, on the charge on which he had been convicted in the United States. The United States subsequently filed a complaint against Browne on entirely different charges and obtained his extradition from Canada for trial on the new charges. When Browne arrived, however, the United States imprisoned him on the original convictions for which extradition had been refused. The Court held that "obtain[ing] the extradition of a person for one offense and then punish[ing] him for another and different offense" violated the treaty and that, under the circumstances, release was an appropriate remedy. *Id.* at 321. The Court did not purport to hold that release is the sole permissible remedy in any case involving a potential violation of an extradition treaty. Rather, release was appropriate in *Johnson* because Canada had refused extradition on the *only* conviction

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district court correctly found that those conditions would not include "a full re-sentencing *on all counts*." Pet. App. 4; *id.* at 35-36.

on which the United States sought to hold Browne after his extradition. Here, by contrast, Austria consented to extradition on all but one of the charges on which petitioner was convicted; its only restriction was that he not be punished on Count 93. The district court correctly concluded that compliance with the Treaty in these circumstances did not require petitioner's complete release.

Indeed, as the district court pointed out (Pet. App. 39-40), it would be inappropriate to grant more relief than necessary to avoid a violation of the Treaty. As this Court has stated, "the general rule," even for constitutional errors, is "that remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 721-722 (1990) (disapproving order of release as bearing neither "causal nor proportional relation to any harm caused" by the delay at issue). The resentencing ordered by the district court would satisfy the only conditions on which Austria granted petitioner's extradition. Accordingly, ordering petitioner's release—when Austria expressly agreed to petitioner's extradition on all other counts of conviction—would be a grossly disproportional and unnecessary remedy.

3. Finally, in an apparent effort to demonstrate that release would be the only possible remedy, petitioner argues (Pet. 21-24) that the court of appeals' decision to permit him to pursue an appeal of his sentence and conviction on Counts 1-92 conflicts with principles of procedural default and finality and that the court should have held that petitioner had defaulted all of the claims that he might have raised in an appeal of his convictions.

Permitting an appeal, however, was an appropriate exercise of the courts' remedial discretion, when the government did not oppose granting the appeal, Pet. App. 4, and Austria had indicated that it understood that resentencing petitioner without Count 93 would "lead to a right of appeal," *id.* at 93.

Petitioner argues that because his earlier appeal was dismissed with prejudice under the fugitive disentitlement doctrine, procedural-default rules should categorically bar him from appealing his newly entered conviction and sentence. As petitioner acknowledges (Pet. 23), however, the general rule that claims that should have been raised on direct appeal may not be raised later is "neither a statutory nor a constitutional requirement," but instead is a court-enforced doctrine that protects judicial resources and finality. *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). Under traditional procedural-default principles, see *Lynn* v. *United States*, 365 F.3d 1225, 1243-1244 (11th Cir.) (holding that traditional procedural-default rules apply when a defendant's appeal was dismissed under the fugitive-disentitlement doctrine), cert. denied, 543 U.S. 891 (2004), the court of appeals would not be required to sua sponte raise any procedural-default issue in the absence of any assertion of procedural default by the government. See *Trest* v. *Cain*, 522 U.S. 87, 89 (1997); Gov't C.A. Br. 64-67 (stating that "[t]he United States has no intention of moving to dismiss" petitioner's appeal and that the lower courts would be unlikely to find petitioner's appeal procedurally barred, in light of Austria's understanding that petitioner would receive an appeal of his convictions). Thus, the court of appeals correctly rejected petitioner's argument that he should be re-

leased because any appeal of his convictions would be entirely barred by procedural-default rules.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2011

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[4] Petitioner's contention (Pet. 34) that his sentence should be reconsidered in light of *United States* v. *Booker*, 543 U.S. 220 (2005), and the factors in 18 U.S.C. 3553(a) is a claim that he should raise in his reinstated appeal. See Pet. App. 4-5.

APPENDIX

LEGAL AND CONSULAR SECTION

Federal Ministry
of Foreign Affairs

File designator 125351/0003e-IV.1/2002

To the
Embassy of the
United States of America
Boltzmanngasse 16
1090 Vienna

Diplomatic Note

The Federal Minister of Foreign Affairs presents its complements to the Embassy of the United States of America and has the honor of informing it, referencing its diplomatic note 125351/0003e-IV.1/02 dated 17 April 2002, that the Federal Minister of Justice, based on a decision of the Higher Regional Court in Vienna dated 8 May 2002, has granted the extradition of Shalom WEISS, an American citizen born 1 April 1954 in Scranton, Pennsylvania, to serve the sentence imposed by verdict 6:98-CR99-ORL-19A of the U.S. District Court for the Middle District of Florida, Orlando Division, based on verdict 98-99 CR-ORL-19A of the same court dated 1 November 1999, for 845 years imprisonment. The portion of the sentence due to Count 93, perjury while a target, is excluded as concerns extradition.

The appropriate American authorities are hereby informed of this.

The Federal Ministry of Foreign Affairs takes this opportunity to reiterate the assurances of its esteem to the Embassy of the United States of America.

Vienna, 17 Apr. 2002

REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF
FOREIGN AFFAIRS